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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1346

GIULIO NATTA ET AL, *Petitioners,*

against

ALEX ZLETZ AND
STANDARD OIL COMPANY OF INDIANA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Giulio Natta, Piero Pino and Giorgio Mazzanti, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 10, 1969, in Appeal No. 17,391 in the above-entitled case. The district court did not file an opinion, but announced its ruling in open court, which ruling was later formalized by a written order, *infra,* p. 2a. The Court of Appeals did not file an opinion, but rather disposed of Appeal No. 17,391 by summary order, *infra,* p. 5a. The two prior opinions of the Court of Appeals in this case are reported at 379 F. 2d 615 and 405 F. 2d 99.

JURISDICTION

The judgment of the court below was entered on March 10, 1969. A timely petition for rehearing was denied on April 7, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Particularly in a documentary discovery proceeding under 35 U.S.C. 24 where the federal courts exercise "an authorized ancillary jurisdiction—a jurisdiction designed to cooperatively complement Patent Office jurisdiction as an aid to the quest for truth" in patent interference proceedings, *Natta* v. *Zletz*, 379 F. 2d 615, 618 (7 Cir. 1967) quoted in *Natta* v. *Hogan*, 392 F. 2d 686, 691 (10 Cir. 1968) and having due regard to the paramount public interest in the expeditious issuance of valid patents, and in the termination of litigation, the questions arising on this petition, the interference proceeding to which the case is ancillary having been declared by the Patent Office more than ten years ago, are:

(1) Was the lower court free to depart from the rule "that an inferior court has no power or authority to deviate from the mandate issued by an appellate court", *Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948), to "affirm" the district court's "Final Order After Remand" which expressly provided that petitioner should "*not*" receive a portion of the documentary discovery which the mandate ordered?

(2) Was the lower court free to refuse to apply against respondents the established rule of the federal appellate courts that points raised in the district court but not briefed or argued on appeal are abandoned and on that basis to direct a resumption of proceedings in the district court thus unnecessarily prolonging this ancillary litigation?

STATUTES AND REGULATIONS INVOLVED

This case involves 35 U.S.C. (*infra*, p. 1a); 35 U.S.C. 135 (a) (*infra*, p. 1a); and 28 U.S.C. 1254(1) (*infra*, p. 1a).

STATEMENT OF THE CASE

This petition seeks review of the judgment in the third appeal (No. 17,391) in this case. The third appeal was

precipitated by the action of the district court in writing an express exception favorable to respondents into the mandate from the second Appeal No. 16,997 which was decided adversely to respondents. The court below, in the judgment to which this petition is directed, purported to conditionally "affirm" this usurpation of prerogative by the trial judge.

In its opinion filed December 19, 1968 (A593)[1] in the second appeal (No. 16,997), the court below summarized the nature of the litigation and the prior proceedings as follows: "In September 1958, the United States Patent Office instituted Interference No. 89,634 to determine which of four applicants for a patent first invented a plastic product known as solid polypropylene. Defendants Zletz and his assignee, Standard Oil Company of Indiana ('Standard') [respondents here], and other junior parties to the Interference introduced evidence before the Board of Patent Interferences in an attempt to advance their invention dates prior to the date to which plaintiffs ('Natta') [petitioner here], as the senior parties to the Interference, are presumptively entitled. See 37 C.F.R. § 1.257(a). In June 1966, Natta filed an ancillary action under 35 U.S.C. § 24 seeking the production of documents of defendants, pursuant to Rule 34 of the Federal Rules of Civil Procedure, for use in Natta's rebuttal case before the Board. In November 1966, the production motion was denied on jurisdictional grounds, resulting in reversal by this Court. (See 379 F. 2d 615.)

"During the subsequent proceedings in the district court, defendants made numerous documents available to Natta. However, in May 1968, the district court entered an order refusing access to three categories of defendants' documents" (405 F. 2d 99, 100; A593).

The Court then announced the general nature of its ruling in the second Appeal No. 16,997 as follows:

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[1] On January 30, 1969 the court below ordered that ". . . the 2-volume appendix in Appeal No. 16,997 will be deemed Volumes I and II of the appendix . . . [in Appeal No. 17,391]". Documents reflecting the relevant

"... We now set aside this order as unduly restrictive and not in accord with the broad type of discovery and duty of full disclosure contemplated by the patent laws, including 35 U.S.C. § 24. *In re Natta*, 388 F. 2d 215, 217 (3d Cir. 1968); *Natta* v. *Hogan*, 392 F. 2d 686, 691 (10th Cir. 1968). The maximum amount of evidence should be available to the Patent Office for its sifting of the interference issues. . . ." (405 F. 2d 99, 100; A594)

Apposite on this petition is the specific ruling in Appeal No. 16,997 which unqualifiedly rejected respondents' objection to producing post-October 15, 1954 documents. In overruling the trial judge on this issue, the appellate court held:

"Finally, the district court selected October 15, 1954, the date of Zletz's application, as the cut-off date for discovery. Since it is well settled that events following the date of a patent application may cast doubt on the patentability of the product . . . the cut-off date selected was improper. Subsequent documents may bear on events prior thereto and also on any actual reduction to practice by Standard. *They should be produced if they are in the categories already sought by Natta.*" (405 F. 2d 99, 102; A596-597)

Respondent having presented no request for rehearing, the court below filed its mandate in Appeal No. 16,997 on January 14, 1969. The mandate "ordered . . . that this cause be . . . REMANDED to the said District Court, in accordance with the opinion of this Court. . ." (A598).

THE MANDATE ISSUE

On January 17, 1969, two days after the mandate from Appeal No. 16,997 was received by the district court, peti-

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proceedings after the remand from Appeal No. 16,997 were presented as Volume III of the Appendix in Appeal No. 17,391. Volume III continued the pagination of Volumes I and II and thus begins with Appendix page 591.

In this petition citations to the record below are largely to this 3-volume Appendix, thus (A—). Unless otherwise stated, all emphasis has been added.

tioner filed and moved in open court for entry of a proposed "Final Order after Remand" (A600). This proposed "Final Order" was carefully drafted to conform to the appellate opinion which the mandate incorporated. It included paragraphs B and C(3) as follows:

> "B. To the extent it has not already done so, *Standard shall produce* for inspection by Natta counsel all of the documents with respect to which Standard's objections were sustained by said hereby vacated Final Order, *subject* ONLY *to the terms and conditions set forth in the aforementioned opinion of the United States Court of Appeals for the Seventh Circuit . . .*;
>
> "C. Specifically, but only by way of elucidation and not in limitation of the foregoing paragraphs A and B hereof, Standard shall produce for inspection by counsel for Natta et al:
>
> . . . . . .
>
> "(3) *all documents dated subsequent to October 15, 1954 in the categories already sought by Natta.*" (A613-614)

It will be noted that the words "in the categories already sought by Natta" are taken verbatim from the opinion in Appeal No. 16,997 (A597).

Respondents objected to petitioner's proposed order on the ground that "many" of the post-October 15, 1954 documents, although "in the categories already sought by Natta" "would be privileged and work product" (January 17, 1969 Transcript; A607).[2]

The district court sustained respondents' objection. On January 21 the district court signed "nunc pro tunc" as of January 17, 1969 *respondents'* version of a "Final Order after Remand", which expressly provided, contrary to the mandate in Appeal No. 16,997, that respondents "shall *not* be required" to produce those documents dated subsequent

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[2] An alleged "List" of these documents (reproduced *infra*, p. 6a) has now been filed with the district court. It is apparent from inspection of this "List" that hundreds or even thousands of pages of material are included.

to October 15, 1954 and "in the categories already sought by Natta" *which respondents might themselves judge to be subject to privilege or work product immunity.* Specifically the district court's January 21, 1969 order defined an express exception to the mandate by stating that respondents should produce the documents requested by the production motion

> "B. . . . *subject only* to the terms and conditions set forth in the aforementioned opinion of the United States Court of Appeals for the Seventh Circuit AND *paragraph D hereof;*
>
> "C. Specifically, but only by way of elucidation and not in limitation . . . Standard shall produce for inspection by counsel for Natta et al:
>
> * * * * *
>
> "3. all documents dated subsequent to October 15, 1954 in the categories already sought by Natta.
>
> "D. Notwithstanding anything in the prior provisions of this Order, Standard shall not be required to produce documents constituting or disclosing confidential communications between Standard the client and counsel for Standard and relating to the seeking of, or giving of, legal advice of any kind, nor shall counsel for Standard be required to submit to Natta or its counsel any documents in the nature of attorney's work product developed in anticipation of Interference 89,634 or in anticipation of these proceedings." (A626-628)

On January 20, 1969, petitioner, believing that the district judge lacked prerogative to rule that respondents "shall *not* be required to produce" a portion of the documents falling within the literal language of the mandate from Appeal No. 16,997, sought relief by petition for an extraordinary writ. The writ was summarily denied January 22, 1969 [3] and Appeal No. 17,391 duly noticed on January 24, 1969 (A629).

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[3] The order denying the writ appears *infra*, p. 23a.

On January 30, 1969, in granting petitioner's motion to expedite proceedings and to suspend the rules, the court below fixed an abbreviated briefing schedule, ruled that the case would be taken under advisement without oral argument, and requested the parties in their briefs to discuss, *inter alia:*

> ". . . whether *appellees* have *waived* the attorney-client and work product privileges specified in paragraph D of the district court's order of January 21, 1969, *by failure to raise the issue in Appeal No. 16997*, or for other reasons. . . ."[4]

On March 10, 1969 the court below disposed of Appeal No. 17,391—without opinion—by a summary order in pertinent part stating:

> "The principal question presented by this appeal is whether our mandate of January 14, 1969, following the issuance of our opinion reported in 405 F. 2d 99, precluded the district court from entering an order excepting from appellant Natta's documentary inspection appellee Standard's attorneys' work product and confidential communications between them and Standard with respect to certain legal advice.
>
> "Upon consideration of the briefs and the appendix, the district court's order of January 21, 1969, is affirmed, but without prejudice to Natta's contesting Standard's work product and privilege claims on the merits before the district court."[5]

On April 7, 1969 a timely petition for rehearing *en banc* was denied.[6] On April 9, 1969 petitioner filed a request to expedite the mandate which resulted in issuance of such mandate on April 11, 1969.[7]

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[4] The January 30, 1969 order appears *infra*, p. 2a.

[5] The March 10, 1969 order appears *infra*, p. 5a.

[6] The April 7, 1969 order denying rehearing appears *infra*, p. 25a.

[7] The purpose of the request was to expedite such proceedings as may be appropriate in the district court and thus to avoid any unnecessary delays in the Patent Office disposition of Interference 89,634. We are of the considered opinion, however, for the reasons stated in this petition that the

The court below has condoned the usurpation of prerogative by the district court to limit the scope of its January 14, 1969 mandate in Appeal No. 16,997. It has done so by its own *ex post facto* "interpretation" of that mandate to include an express exception not recited in it and inconsistent with its plain language.

Further, by its March 10, 1969 order the court below expressly recognized that the district court's order was *erroneous because respondents were permitted to judge for themselves* the merits of their work product and privilege claims. The court below did *not* vacate the district court's order in view of this acknowledged error as it should have. Rather, again resorting to "interpretation", it construed that order—just as it had previously construed its own mandate, to include an unrecited and irreconcilable provision—to wit, a right in petitioner to contest "Standard's work product and privilege claims on the merits before the district court". And, on the pretext that the district court's order contained such a provision, "affirmed" the order.

If the district court's January 21, 1969 order *in fact* included such a right in petitioner then the court below had *no* jurisdiction in Appeal No. 17,391 because the January 21, 1969 order was not "Final" and hence not appealable under 28 U.S.C. 1291. In such a case, Appeal No. 17,391 should have been dismissed as premature. But, of course, the January 21, 1969 order was, in fact, "Final," having been so designated by the district judge, and, as such, was admittedly erroneous. It was not the province of the appellate court to salvage the order by "interpretation" and on that ground to affirm. Indeed, the purported affirmance is inconsistent with the condition (Natta's right to contest in the district court) to which it is subject.

Not surprisingly, the court below elected to dispose of Appeal No. 17,391 by summary order, rather than by an attempt to explain in a reasoned opinion its manifest de-

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judgment in Appeal No. 17,391 must be vacated and that there should be no further proceedings in the district court, whereby maximum expedition in the disposition of the interference proceeding will be achieved.

parture from the accepted and usual conduct of judicial proceedings.

THE WAIVER ISSUE

Petitioner's production motion requests 26 categories of documents. It recognizes no exception for documents which might be alleged by respondents to be immune from production on work product or privilege grounds. Instead it expressly includes all such material (A2).

Respondents admitted in the district court at the January 17, 1969 hearing that "This privilege problem and work product has been in this case from the beginning. In our very first brief that was filed in the summer of 1966 we recognized this" (A607), and that "When we filed our formal objections [A539] last year objecting to producing documents after October 15th, 1954, we told your Honor that many of these would be privileged and work product. This was one of the grounds for objecting" (A607).

Respondents in their brief in Appeal No. 17,391 admitted in the court below that they "objected to the production of its attorney-client and work product documents during the District Court proceedings, commencing with its first brief [filed July 21, 1966-A39-62] in opposition to Natta's Rule 34 motion through its written objections preceding the District Court's Final Order of May 16, 1968" (p. 1). Respondents also acknowledged to the court below that in the briefs on the *second* appeal, No. 16,997, "The 'Statement of Facts' of both parties did recognize that Standard *had filed* attorney-client and work product objections" (p. 10, n. 6) and that "on Appeal No. 16,997, the merits of Standard's objections were never raised or argued" (p. 2).[8]

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[8] In their brief in Appeal No. 16,997, respondents did state erroneously:

"... Standard further agreed to drop its previous objection to producing communications with its experts regarding their retention (A353-4).[5]

"5. Montecatini [petitioner] acknowledged that such communication need not include any 'work product or privileged documents'" (Appellees' Brief in Appeal No. 16,997, p. 10). (cont'd.)

In these premises respondents' work product and privilege claims were waived. Yet the Court of Appeals, although it asked the parties in its order of January 30, 1969, to discuss the respondents' waiver, avoided the issue completely, placing its summary disposition of Appeal No. 17,391 exclusively upon an "interpretation" of its mandate on the second appeal.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The decision below endorsing the district court's exception to the mandate in Appeal No. 16,997 is in conflict with the applicable decisions of this Court culminating in *Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304 (1948). In *Briggs* this Court stated:

> "In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. Himely v. Rose, 5 Cranch (US) 313, 3 L ed 111; The Santa Maria, 10 Wheat (US) 431, 6 L ed 359; Boyce v. Grundy, 9 Pet (US) 275, 9 L ed 127; Sibbald v. United States, 12 Pet (US) 488, 9 L ed 1167. The rule of these cases has been uniformly followed in later days; see, for example, Re Washington & G. R. Co., 140 US 91, 35 L ed 339, 11 S Ct 673; Ex parte Union S.B. Co. 178 US 317, 44 L ed 1084, 20 S Ct 904; Kansas City S.R. Co. v. Guardian Trust Co. 281 US 1, 74 L ed 659, 50 S Ct 194. Chief Justice Marshall applied the rule to interdict allowance of interest not provided for in the mandate, Himely v. Rose, 5 Cranch (US) 313, 3 L ed 111; Mr. Justice Story explained and affirmed the doctrine, The Santa Maria, 10 Wheat (US)

In our Reply Brief we exposed the error in this representation by respondents. We said:

> "It needs to be emphasized that Natta has never 'acknowledged' that *any* documents within the scope of its motion may be withheld on grounds of work product or privilege as Standard states (S. Br. 10, n. 5). The *very* statement of counsel said to support this misrepresentation makes it clear that '*all* documents required by the motion' were sought (A422). The Group II documents include all those which may have been withheld on that basis." (Appellants' Reply Brief in Appeal No. 16,997, p. 11, n. 12; partial emphasis in original.)

> 431, 6 L ed 359; Boyce v. Grundy, 9 Pet (US) 275, 9 L ed 127. We do not see how it can be questioned at this time. . . ." (334 U.S. at 306)

In *Briggs,* the specific issue was whether the appellate court properly struck out an award of interest by the district court for which the appellate mandate did not provide. On that issue this Court said:

> ". . . It is clear that the interest was in excess of the terms of the mandate and hence was wrongly included in the District Court's judgment and rightly stricken out by the Circuit Court of Appeals. The latter court's mandate made no provision for such interest and the trial court had no power to enter judgment for an amount different than directed. . . ." (334 U.S. at 306)

Similarly, in its opinion of December 19, 1968, which became a part of the mandate in Appeal No. 16,997, the court below held that all post-October 15, 1954 documents should be produced by respondents "if they are in the categories already sought by Natta". The court's mandate made "no provision for" the exception of documents for which respondent might assert a claim of work product or privilege and the "trial court had no power to enter judgment" that respondents "shall *not* be required to produce" a portion of the documents subject to that mandate.[9]

2. The need for review by this Court is accentuated by respondents' reliance, in Appeal No. 17,391, upon a plu-

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[9] The decision in Appeal No. 17,391 is, of course, also at odds with the many decisions of the lower federal courts, including the prior decisions of the court below which have respected the authority of *Briggs* and the principles on which it rests. See, *e.g.,* from the court below *Townsend* v. *Ogilvie,* 360 F. 2d 925 (7 Cir. 1966); *Bankers Life and Casualty Co.* v. *Bellanca Corp.,* 308 F. 2d 757 (7 Cir. 1962); *Lee* v. *Terminal Transport Co.,* 301 F. 2d 234 (7 Cir. 1962); and from courts in other circuits: *Noel* v. *United Aircraft Corp.,* 359 F. 2d 671 (3 Cir. 1966); *Poletti* v. *C.I.R.,* 351 F. 2d 345 (8 Cir. 1965); *United States* v. *Cato Brothers, Inc.,* 273 F. 2d 153 (4 Cir. 1959); *Federal Home Loan Bank of San Francisco* v. *Hall,* 225 F. 2d 349 (9 Cir. 1955); and *Reconstruction Finance Corp.* v. *Service Pipe Line Co.,* 206 F. 2d 814 (10 Cir. 1953).

rality of inapposite decisions of this Court, including *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939) which states that "... While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues". See also *Mutual Life Ins. Co.* v. *Hill,* 193 U.S. 551 (1904).

Since the court below announced no reasons for its decision in Appeal 17,391, the possibility must be recognized that respondents' arguments based on these and similar cases may have been persuasive. Review is in order to emphasize that these cases have no application to situations such as those presented by the case at bar—the consequence of a party's failure to timely press a claim being *waiver,* not "preservation" thereof.

3. The refusal of the court below to bind respondents by their waiver of work product and privilege claims conflicts with the applicable decisions of this Court, with the apposite decisions of other courts of appeal and with the lower court's own prior decisions.

As noted, respondents admitted below that they "objected to the production of its attorney-client and work product documents during the District Court proceedings, commencing with its first brief in opposition to Natta's Rule 34 motion through its written objections preceding the District Court's Final Order of May 16, 1968", and that "The 'Statement of Facts' of both parties" in Appeal No. 16,997 "did recognize that Standard had filed attorney-client and work product objections" and that "on Appeal No. 16,997, the merits of Standard's objections were never raised or argued" (Appellees' Brief in Appeal No. 17,391, pp. 1-2).

In *California* v. *Taylor,* 353 U.S. (1957) 553, this Court, affirming the court below, said:

> "In its briefs before this Court, California suggests that the collective-bargaining agreement is invalid because the Board of State Harbor Commissioners lacked

> authority to negotiate the contract, some of the terms of which are in conflict with the state civil service laws. The [Seventh Circuit] Court of Appeals, however, held that this contention had been waived because it was not briefed there by the State and not mentioned in the State's oral argument. We, accordingly, do not recognize this contention here. . . ." (353 U.S. 553, 556, n. 2)

In *NAACP* v. *Alabama,* 360 U.S. 240 1205 (1959), the State of Alabama, while before this Court, failed to raise any grounds in support of a contempt citation entered by the Supreme Court of Alabama against the NAACP, except the latter's refusal to produce copies of its membership lists. After reversal and remand to the Alabama court, the State belatedly reverted to other grounds in support of the contempt citation which had not been argued here. This Court held that these grounds had been waived.

In *General Finance Loan Co.* v. *General Loan Co.,* 163 F. 2d 709, 711 (8 Cir. 1947), the court said:

> "... It has long been a rule of federal appellate courts that points not briefed and argued [before them] in a civil case will generally be regarded as abandoned, requiring no consideration on appeal. [Citing cases, including *Whiting* v. *United States Bank,* 13 Pet. 6, 38 U.S. 6, 13; *I.T.S. Rubber Co.* v. *Essex Rubber Co.,* 272 U.S. 429, 432; *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359, 369]." (163 F. 2d at 711)

See also *Thornton* v. *Carter,* 109 F. 2d 316 (8 Cir. 1940) and *Southwestern Petroleum Corp.* v. *Udall,* 361 F. 2d 650 (10 Cir. 1966).

The court below, without explanation, refused to apply this long established "rule of the federal appellate courts".

4. Fundamental to our jurisprudence is the idea that there must be an end to litigation. The basic rule of *res judicata* is soundly based on this principle. Among its natural concomitants are the corollary rules that issues

not timely pressed are waived and that *nisi prius* courts are without discretion to tamper with the mandates of their courts of appeal. As this Court has said: "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions. . .", *United States* v. *Camou,* 184 U.S. 572, 574 (1902).

These considerations are particularly cogent today when understaffed courts are attempting to deal with an unprecedented mass of litigation. Under such circumstances the departure of the court below from established procedures to tolerate respondents' abandoned work product and privilege claims warrants the exercise of the supervisory authority of this Court.

It would be hard to imagine a case where the exercise of that authority to preclude the unnecessary prolongation of litigation would be more appropriate. In its first opinion in this case the court below correctly held that 35 U.S.C. 24 vested in the federal district courts an "ancillary jurisdiction—a jurisdiction designed to cooperatively complement Patent Office jurisdiction as an aid to the quest for truth". *Natta* v. *Zletz,* 379 F. 2d 615, 618 (7 Cir. 1967) cited and quoted *Natta* v. *Hogan,* 392 F. 2d 686, 691 (10 Cir. 1968). In its second opinion, while again emphasizing "the public interest in seeking the truth about who is entitled to this patent", the court below, acknowledging another important aspect of its "cooperative" jurisdiction, directed "counsel for both sides" to endeavor "to complete this overdue discovery with dispatch, thus enabling the Board of Patent Interferences to dispose of this matter without further ancillary delays" (405 F. 2d 99, 102; A597). Yet the court below seemingly overlooked this aspect of the matter in disposing of Appeal No. 17,391. It simply failed to recognize for what it is respondents' conduct pattern of premeditated obstructionism.

When it is remembered that Interference 89,634 has been pending in the Patent Office for more than ten years, the proper exercise of "cooperative" jurisdiction with the

Patent Office does not contemplate a relaxation for respondents' benefit of the rules of law which should have put an end to this litigation with the second appeal. Particularly so when the enforcement of these rules would further aid the "quest for truth" by releasing from secrecy the mass of materials which respondents still withhold.

CONCLUSION

Having regard to the clear error in the decision below, it is respectfully requested that this petition be granted and that a summary reversal be concurrently ordered so that the disposition of Interference 89,634 will not be further delayed.

Respectfully submitted,

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